Filed April 4, 1900

Supreme Court of the United States.

OCTOBER TERM, 1899.

NO. 312.

JOHN M. AVERY, CHAS. C. COBB AND S. T. PHILLIPS,

Plaintiffs in Error,

v.

I. POPPER & BRO. AND R. R. NEYLAND ET AL.,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

JOHN M. AVERY,

Attorney for Plaintiffs in Error.

Supreme Court of the United States,

OCTOBER TERM, 1899.

NO. 312.

JOHN M. AVERY, CHAS. C. COBB AND H. I. PHILLIPS,
Plaintiffs in Error,

v.

I. POPPER & BRO. AND R. R. NEYLAND Et Al,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

On June 10th, 1889, in the Circuit Court of the United States for the Northern District of Texas, W. W. Avery recorded a judgment against J. H. Cooke for $2,600.00 and interest. By writ of error Cooke carried the case to the Supreme Court of the United States, where it was affirmed against him on January 23, 1893 (see Cooke v. Avery, 147 U. S. 375). The mandate was sent down, and, on June 5, 1893, judgment was entered on it by the United States Circuit Court ordering execution to issue

against him for the amount (Record p. 33). On June 8, 1893, an execution was duly issued thereon against him by said United States Circuit Court, and was placed in the hands of the United States marshal for the Northern District of Texas, who levied on the property in controversy, as the property of said Cooke, on June 15, 1893, and sold the property June 28, 1893, to W. W. Avery, and it was delivered to his attorney, John M. Avery (Record pp. 34 and 35).

On May 26, 1891, J. H. Cooke attempted to give a chattel mortgage on certain property to secure a note in favor of T. H. King. This paper described the property as being 50 cows branded Cooke OK, with spring calves following the cows, and also five mares branded J 6, with colts following the mares, all being in a pasture in Hunt county, Texas (Record pp. 25 and 26). At the time this paper was given the mortgagor had in this pasture 100 similar cows with calves following them and 10 similar mares with colts following them, all mingled together, and nothing was ever done towards separating or designating those attempted to be mortgaged (Record pp. 25, 36, 40 and 43). The United States marshal, under the above execution, levied on, seized and sold the whole herd as the property of J. H. Cooke, to W. W. Avery, and delivered the animals to his attorney, J. M. Avery (Record p. 34). On this point the Supreme Court of Texas found as follows: "At the time the mortgage was executed to secure the note there were many more animals of the same description mingled with those upon which the mortgage was given * * *, but the animals covered by the mortgage were not separated from the others of the same description with which they were mingled,

nor was there such separation when the execution in favor of Avery was levied upon the property in controversy" (Record p. 64).

The defendants in error claimed to own the above note in favor of King, and on June 29, 1893, they brought these suits in the State court to foreclose this alleged mortgage, and sued out writs of sequestration, under which the State sheriff seized fifty cows, seventeen 2-year-old steers, thirty-three 2-year-old heifers and one mare 2 years old, one horse 2 years old and one mule 2 years old. It was claimed by defendants in error that these steers and heifers were calves in 1891, and that said mare, horse and mule were colts in 1891. Plaintiff in error J. M. Avery gave a replevy bond with C. C. Cobb and H. I. Phillips as sureties, and regained possession of this property and sold it. Defendants in error alleged that J. M. Avery had converted the property, and asked damages for its value against him and his sureties (Record pp. 1 to 4).

The plaintiffs in error pleaded the above facts, and have insisted upon and urged throughout this litigation that this mortgage was invalid as against them, and that the levy of the execution by the United States marshal created a lien on the property superior to the alleged mortgage lien, and that the sale by said marshal passed title to the property to them and those under whom they claimed free from the rights or liens of the mortgagee. This was presented below by their pleading, motion for new trial, assignments of error, motion for rehearing, &c. (Record pp. 6, 53, 78 and 79). They also pleaded and urged that the mortgage was fraudulent and void as against them because the mortgagor was insolvent, and had been

allowed by the mortgagee to sell some of the mortgaged property and to keep the proceeds for his own use, and that at least the mortgage was invalid as to the colts, and that a different and higher measure of damages was applied in this case from that applied for a conversion by a State sheriff under similar circumstances (Record pp. 6, 50, 80 and 81).

The judiciary system of appellate courts in Texas is in many respects similar to that of the United States. There are five courts of civil appeals to which appeals and writs of error are taken from the trial court. If the judgment is affirmed and the Supreme Court thinks the affirmance wrong, a writ of error may be obtained from that court carrying the case to the Supreme Court of the State.

This case was first tried in 1894 and judgment rendered against plaintiffs in error, but on appeal by them the mortgage was held invalid, and the judgment was reversed and the case remanded by the Court of Civil Appeals of the FIFTH Supreme Judicial District (see Avery v. Popper, 34th Southwestern Reporter, 325). On a second trial in November, 1897, judgment was again rendered against plaintiffs in error for $850.00. This was for the value, at the time of the trial, of the 50 cows and the mare, horse and mule, but not for the steers and heifers (Record pp. 12 and 13). On a second appeal by plaintiffs in error this judgment was affirmed by the Court of Civil Appeals of the FOURTH Supreme Judicial District, and judgment was also rendered against them for the value of the steers and heifers. This court overruled the holding on the first appeal (Record pp. 53 to 61). The Supreme Court of Texas then granted a writ

of error (Record p. 62). That court rendered three judgments, and by the last one it reversed the judgment of the Court of Civil Appeals as to the steers and heifers and affirmed the judgment of the trial court for $850.00, the value of the cows, mare, horse and mule. The Supreme Court held: (1) that defendants in error could recover the value of the 50 cows; (2) that they could not recover the value of the 50 calves; and (3) that they could recover the value of the three colts (Record pp. 62 to 68 and 76 to 77). This was the first and only decision of this question by the Supreme Court of Texas.

To this decision and judgment a writ of error was allowed by Hon. E. D. White, associate justice of this Court (Record p. 82), and plaintiffs in error have duly filed and now present and urge the following specification of errors (Record pp. 84 to 87), viz.:

FIRST ASSIGNMENT OF ERROR.

The Supreme Court of Texas erred in affirming the judgments below against plaintiffs in error, J. M. Avery, C. C. Cobb and H. I. Phillips for any amount, and in rendering judgment against them for any amount, because all of said judgments are contrary to the law, evidence and facts, in that, the pleadings, evidence and facts showed that all of the property sued for was legally levied upon by the United States marshal for the Northern District of Texas under a valid execution issued from the United States Circuit Court for the Northern District of Texas, at Dallas, Texas, based upon a valid judgment rendered by said court, and was legally sold by said marshal, and that all of said property belonged to J. H. Cooke, the defendant in said

judgment and execution, and was legally levied upon and sold thereunder, and a good title to same passed to the purchaser at said sale, and that the mortgage sued on was void as against said execution and the purchaser thereunder, and said plaintiffs in error claimed under said execution and sale thereunder and said purchaser, and the evidence fails to show that defendants in error had selected any animals branded, marked and aged as described in said mortgage, and said judgment failed to give full force and effect to said execution, levy and sale, and the acts of said marshal thereunder, and are against the right, title, commission, authority and immunity specially set up and claimed by said plaintiffs in error under said execution and the laws of the United States and the judgment and courts thereof (Record p. 84).

SECOND ASSIGNMENT OF ERROR.

The Supreme Court of Texas erred in affirming the judgments below, and in rendering judgment against plaintiffs in error, J. M. Avery, C. C. Cobb and H. I. Phillips, and in holding that the alleged mortgage sued on was valid as against the above mentioned judgment and execution of the United States Circuit Court, and the levy and sale thereunder by said United States marshal, and in holding that the mortgagee could recover against the purchaser at such sale, and those claiming under him, the value of 50 cows and three horses and mules, because, as appears from the evidence, the findings of fact and the opinion of said Supreme Court and the record herein, said mortgage was invalid as against such execution, sale and purchaser in this, to-wit: At the time said mortgage was given there were many more animals of the same

description mingled with those upon which the mortgage was attempted to be given, but the animals attempted to be covered by the mortgage were not separated from the others of the same description with which they were mingled, nor was there such separation up to the time said execution from the United States Court was levied on the property in controversy, nor had the mortgagee in any way attempted to make a selection of any animals, and the animals involved in this case being a part of a larger number of the same description, and not having been separated nor identified no lien attached to any particular animals in the herd, and no right attached under the attempted mortgage to any specific animals, nor did it give a lien upon an undivided interest in the herd, and as a matter of law said mortgage was invalid as against said execution, levy and sale, and said property passed to the purchaser at said execution sale and the plaintiffs in error claiming under him, free from any claims or rights therein by said mortgagee, and said judgment of said Supreme Court of Texas is against the rights and title specially claimed under said judgment of the United States Circuit Court, and execution sale, and the acts of said United States marshal, and fails to give full force and effect to the same, the decision in this case being the first one by the Supreme Court of Texas or any other supreme court holding such an attempted mortgage valid against execution creditors (Record p. 85).

THIRD ASSIGNMENT OF ERROR.

The Supreme Court of Texas erred in affirming the judgments below, and in rendering judgment against said plaintiffs in error for $850.00,

because from the opinion of said Supreme Court, and the record herein, it clearly appears that at most, plaintiffs in error were only liable for the value of 50 cows of the value of $13.00 per head, and this would only amount to $650.00, and the adtional $200.00 consists of the value of one bay mare colt, one bay horse colt, and one black mule colt, and said mortgage sued on did not attach to or cover said three colts, they having separated from their dams before any right of selection was exercised, and said colts were duly levied on and sold by said United States marshal under the above mentioned judgment and execution from said United States Court, and they belonged to the defendant in said execution, and title passed by said sale, and plaintiffs in error claimed under said sale, and to this extent, at least, said judgment of said Supreme Court of Texas is against the right and title specially claimed under said United States Circuit Court judgment and execution sale, and the acts of said United States marshal, and fails to give full force and effect to same (Record pp. 85 and 86).

FOURTH ASSIGNMENT OF ERROR.

The Supreme Court of Texas erred in affirming the judgments below and in rendering judgment against said plaintiffs in error, and in holding that the mortgage sued on was good as against them, because the undisputed evidence and the facts showed, as a matter of law, that the mortgage sued on in connection with the acts of the mortgagor and mortgagee was fraudulent and void as against the creditors of the mortgagor and those claiming under such creditors, in that, the mortgagor, J. H. Cooke, was insolvent, and with

the consent of the mortgagee he sold $800.00 worth of the mortgaged property, and with said consent retained and used $200.00 of said money for his own use and benefit, and plaintiffs in error claimed under a judgment against J. H. Cooke, rendered by the United States Circuit Court for the Northern District of Texas long before the giving of said mortgage, and under a valid execution issued on said judgment by said court, and a valid levy and sale thereunder by the United States marshal for the Northern District of Texas, and said judgment of said Supreme Court of Texas is against the right and title specially claimed under said United States Circuit Court judgment and execution sale, and the acts of said United States marshal, and fails to give full force and effect to same. (Record p. 86).

FIFTH ASSIGNMENT OF ERROR.

The Supreme Court of Texas erred in affirm- the judgments below, and in rendering judgment against said plaintiffs in error for $850.00, the alleged value of 50 cows and 3 colts, because, under the circumstances of this case, the findings of fact, as to the value of said animals, and the evidence upon which said findings were based, did not, as a matter of law, furnish a proper basis or measure of damages by which judgment could be rendered against them, in that, said findings established said values at the time of the last trial of this case in November, 1897, and not their value at the time the sequestration proceedings occurred, or the conversion, if any, took place in June, 1893, and said judgment of said Supreme Court applies a different rule and allows greater damages when a sale is made under a valid execution from the Uni-

ted States Court by the United States marshal from that applied and allowed when a sale is made under an execution from a State court by a State sheriff, or other State officer, in similar cases, and thereby said judgment of said Supreme Court discriminates adversely, unjustly and illegally against sales made under executions by United States marshals, contrary to the provisions of the Revised Statutes of the United States, Secs. 916 and 788, and said judgment of said Supreme Court fails to give full force and effect to said execution from said United States Circuit Court, and the levy, sale and acts of said marshal thereunder, and is against the right, title, commission, authority and immunity specially set up and claimed by said plaintiffs in error under said execution, and the laws of the United States, and the judgment and courts thereof (Record pp. 86 and 87).

FIRST PRELIMINARY PROPOSITION.

The Supreme Court of the United States has jurisdiction of this case.

AUTHORITIES.

Clement v. Berry, 11 Howard, 398.

Buck v. Colbath, 70 U. S. 334.

Stanley v. Schwalby, 162 U. S. 255.

Etheridge v. Sperry, 139 U. S. 266.

Pittsburg, &c., R. R. v. Long Island, &c., Co., 172 U. S. 493.

Bock v. Perkins, 139 U. S. 628.

Collier v. Stanbrough 6 Howard (U. S.) 14 and 20.

Hurst v. Cobb & Avery, 61 Fed. Rep. 1.

In Clement v. Berry, supra, on writ of error to the Supreme Court of Tennessee, Justice McLean says: "The jurisdiction of this court is the first question to be considered. The plaintiff sets up a lien on certain personal property under a judgment rendered by the Circuit Court of the United States, held for the Middle District of Tennessee. The defendant asserts a lien under a deed of trust for the property from Chas. F. Berry, and the Supreme Court of Tennessee held that the lien of the deed was paramount to that of the judgment. This brings the case within the twenty-fifth section, as the decision was against the right asserted by Clement, under the authority of the United States."

In Stanley v. Schwalby, supra, on writ of error to the Supreme Court of Texas, Justice Gray says: "For instance, if a marshal of the United States takes personal property upon attachment upon mesne process issued by a court of the United States, and is sued in an action of trespass in a State court by one claiming title to the property, and sets up his authority under the United States, and judgment is rendered against him in the highest court of the State, he may bring the case by writ of error to this court." Citing Bock v. Perkigs and most of the other cases cited above.

In Bock v. Perkins, supra, Justice Harlan says: "A case, therefore, depending upon the inquiry whether a marshal or his deputy has rightfully executed a lawful precept directed to the former from a court of the United States is one arising under the laws of the United States."

Etheridge v. Sperry, supra, on writ of error to the Supreme Court of Iowa, was a suit against a deputy marshal by mortgagee for levying on cer-

tain property claimed to be covered by a chattel mortgage, and it was held that the United States Supreme Court had jurisdiction.

Buck v. Colbath, supra, on writ of error to the Supreme Court of Minnesota, was a suit for the value of goods levied on under an attachment from the United States Circuit Court. Justice Miller says: "There seems to be no reason to doubt that the case comes within the provision of the 25th section of the Judiciary Act. The defendants claimed the protection of an authority exercised under the United States, and the decision was against the protection thus claimed."

The plaintiffs in error in the present case set up and claimed that the judgment and execution of the Federal court and the acts of the United States marshal thereunder created a lien on the property superior to the alleged mortgage lien and passed title to them of the property free from the claims of the defendants in error, and afforded them a complete protection in this case, and the decision was against this contention (Record pp. 6, 7, 53 and 76).

SECOND PRELIMINARY PROPOSITION.

The decision of this question by the State court in this case is not binding or conclusive on the United States Supreme Court, because this is the first decision of this question by the Supreme Court of Texas, and it has not become a settled rule of property, and is not in harmony with previous decisions of that court.

AUTHORITIES.

Clement v. Berry, 11 Howard, 398.
Barber v. Pittsburg, &c., Ry. Co., 166 U. S. 83.
Gibson v. Lyon, 115 U. S. 439.
Burgess v. Seligman, 107 U. S. 20.
Stanley v. Schwalby, 162 U. S. 255.
Buck v. Colbath, 70 U. S. 334.

ARGUMENT.

Clement v. Berry, supra, was on writ of error to the Supreme Court of Tennessee, and the judgment was reversed. The question involved was whether a judgment and execution from the Federal court, levied on certain chattels, created a lien superior to a deed of trust on same. Mr. Justice McLean says: "No other decision of the Supreme Court of Tennessee than the one now before us is applicable to this question, and if the case to be reviewed is to constitute the rule for our decision, as insisted, the power of revision would be useless."

In Stanley v. Schwalby, supra, on writ of error to the Supreme Court of Texas, Justice Gray says: "But so far as the judgment of the State court against the validity of an authority set up by the defendant under the United States necessarily involves a decision of a question of law, it must be reviewed by this court whether that question depends upon the Constitution, laws or treaties of the United States or upon local law, or upon principles of general jurisprudence. For instance, if a marshal of the United States takes personal property upon attachment on mesne process issued by a court of the United States, and is sued in an action of trespass in a State court by one claiming

title in the property, and sets up his authority under the United States, and judgment is rendered against him in the highest court of the State, he may bring the case by writ of error to this court, and as his justification depends upon the question whether the title to the property was in the defendant in attachment or in the plaintiff in the action of trespass, this court upon the writ of error has the power to decide that question so far as it is one of law, even if it depends upon local law or upon general principles."

In Gibson v. Lyon, supra, Justice Matthews says: "As a precedent the decision of the Supreme Court of the State, though single, is entitled to peculiar respect, because all the questions decided arise upon the local laws of the State, but it cannot have conclusive force in the courts of the United States unless it has become a rule of property."

In Barber v. Pittsburg Ry. Co., supra, Justice Gray says: "The question whether the opinion of the Supreme Court of the State in the former action is conclusive evidence of the laws of Pennsylvania in a court of the United States, depends upon the further question whether the opinion is declaratory of the settled law of Pennsylvania as to the effect of such devises, or is a decision upon the construction of this particular devise * * *. But a single decision of the highest court of a State upon the construction of the words of a particular devise is not conclusive evidence of the law of the State."

The question of the validity of a chattel mortgage on a certain number of articles out of a larger number of similar articles, as against a levying execution creditor of the mortgagor, was for the

first time presented to the appellate courts of Texas in this litigation, and the present decision is the first one sustaining its validity by the Supreme Court. On the former appeal of this same case, in 1895, the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, on the same facts held this mortgage invalid as against plaintiffs in error. (See Avery v. Popper, 34th Southwestern Reporter, 325.) This stood as the law of Texas for four years until the present decision by the Supreme Court in 1899.

In 1897 the Supreme Court decided the case of Oxsheer v. Watt, 91st Texas, 124. The proposition contended for by the appellee and sustained by the court in that case was this (p. 124): "Between the mortgagor and mortgagee and their privies any description is good if the parties knew and understood what property the mortgage covered." And the Supreme Court says (p. 128): "The facts certified do not show that W. W. Oxsheer is in any better position to prevent the foreclosure than F. G. Oxsheer (the mortgagor) would have been had the title not passed out of him." It is apparent that the validity of such a mortgage as against a levying execution creditor, a purchaser or other third party, was not decided in that case, but only the rights of the parties to the mortgage. In the case at bar the court says that two questions are presented: One, the validity of the mortgage as between the parties; and, two, if valid between the parties then its validity as against execution creditors (Record p. 65). The court then decides on the first question that it is good between the parties and cites on this Oxsheer v. Watt, supra. (Record p. 66). The court then discusses the second question at length and decides it valid as

against creditors, but cites no authority on this question, but on the contrary undertakes to distinguish other cases from the case at bar.

The decision in the case at bar is not only the first decision by the Supreme Court of Texas on this precise question, but it is inconsistent with prior decisions of the same court on an analogous question—rendered many years before.

In Cleveland v. Williams, 29 Tex. 212 (decided in 1867), the sale of a certain number of articles out of a larger number was held invalid, the court saying: "The goods sold must be separated and identified by marks and numbers so as to be completely distinguished from all other goods, or from the bulk or mass with which they happen to be mixed. * * * But if a given number of the whole are sold no title is acquired by the purchaser until they are separated and their identity is thus ascertained and determined."

In Moss v. Sanger, reported in 12th Southwestern Reporter, 616 (decided in 1889), the Supreme Court of Texas held that a sale of part of a stock of goods which had not been separated from the balance of the stock was invalid as against a creditor who levied an execution on the stock, the court saying: "There being no separation or seggregation of the goods so as to be identified no sale was perfected."

These prior decisions of the Supreme Court of Texas are in point. In Richardson v. Alpina Lumber Co., 40 Mich. 206, such a mortgage was held invalid, the court saying: "Had the parties attempted to make an absolute sale of the property, described as in this case, and nothing further had been done thereunder, it is clear within previous decisions of this court such a sale could not be

sustained. I see no good reason for any distinction. It is true that a mortgage upon property is but a mere security for the debt, and that the title to the property remains in the mortgagor. After condition broken, however, when the parties are likely, if at all, to disagree, the mortgagee has the right to take possession and sell the property, so that what at first was a mere security has thus passed into an absolute sale."

THIRD PRELIMINARY PROPOSITION.

When an officer of the Federal court, in the discharge of his duty under process issued from that court, does an act out of which arises a question of law not then settled by the courts of the State, the Federal courts will decide the question according to their own view of the law, and unaffected by decisions of the State courts rendered after the act occurred.

AUTHORITIES.

Burgess v. Seligman, 107 U. S. 20.

Ober v. Gallagher, 3 Otto 199.

Anderson v. Santa Anna Township, 116 U. S. 356.

ARGUMENT.

If this court should be of the opinion that the case of Oxsheer v. Watt, 91 Tex. 124, referred to in the argument under the second proposition above, is an authority upon the questions involved in the case at bar, still this Court should not follow that decision because the levy of the execution involved herein was made on June 15, 1893, and the rights of the parties were then fixed and these suits were brought on June 29, 1893, four years before that decision was rendered in 1897. At the

time these transactions occurred what was the state of the law? The Supreme Court of Texas in Cleveland v. Williams and in Moss v. Sanger had held such sales invalid. Every text writer and reported case had held such a mortgage invalid against an execution creditor. No decision in Texas was to the contrary. Could the marshal have refused to levy the execution on the ground that at some future time the Supreme Court of Texas might declare the law differently? The Federal Court by its writ commanded the marshal to levy the writ according to the law as it existed in 1893. Will the Federal court now condemn him for levying it according to that law? If this Court thinks the levy was good according to the law in 1893, when the transactions took place and the rights of the parties were fixed, will it decide the case according to that law or will it refuse to exercise its own judgment on these transactions and condemn its officer for following the law at that time, because the State court has changed its mind on the question?

The decisions of this Court are clearly to the effect that transactions must be decided by this Court according to the law as it existed when they occurred. In Burgess v. Seligman, supra, this Court, among other things, says: "But the appellants' counsel, with much confidence, press upon our attention the decisions of the Supreme Court of Missouri on the questions involved in this case and on the very transactions we are considering. * * We do not consider ourselves bound to follow the decision of the State court in this case. When the transactions in controversy occurred and when the case was under consideration of the Circuit Court no construction of the statute had

been given by the state tribunals contrary to that given by the Circuit Court. * * So when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

So in Ober v. Gallagher, 3 Otto. 199, this Court held that an express vendor's lien on land passed to the assignee of the debt and refused to follow the decisions of the Supreme Court of Arkansas to the contrary rendered after such assignment was made. In that case this Court said: "Under these circumstances we are not satisfied that, when these notes were assigned, it was a settled rule of property in Arkansas that a lien for purchase money expressly reserved would not pass by an assignment of the debt."

In Anderson v. Santa Anna Township, 116 U. S. 356, this Court says: "While the courts of the United States accept and apply the construction of a State Constitution or of a local statute, upon which the rights of the parties depend, which has been fixed by the course of decisions of the State court, it is the settled doctrine of this Court, that rights accruing under one construction will not be lost merely by a change of opinion in the State court, and where such rights have accrued before the State court has announced its construction, the Federal courts, although leaning to an agreement with the State court, must determine the question upon their own independent judgment. If the decisions of the State court, commencing

with Howard v. St. Clair Drainage Co., would, if applied here, require an affirmance, we cannot depart from the long established doctrine, which makes it our duty to determine the rights of parties, according to that law as judically declared at the time such rights accrued, or, in the absence of any such declaration, according to the law as, in our judgment, it then was."

PROPOSITION UNDER FIRST AND SECOND ASSIGNMENTS OF ERROR.

The decision in the case at bar holding this mortgage valid against a levying execution creditor is wrong and opposed to every authority on the question, because the facts as stated in the opinion of the court below show that, "At the time the mortgage was executed to secure the note there were many more animals of the same description mingled with those upon which the mortgage was given. * * * But the animals covered by the mortgage were not separated from the others of the same description with which they were mingled, nor was there such separation when the execution in favor of Avery was levied upon the property in controversy" (Record, p. 64).

AUTHORITIES.

Northwestern National Bank v. Freeman, 171 U. S. 620.

Avery v. Popper, 34 Southwestern Rep. 325 (Texas).

Cleveland v. Williams, 29 Tex. 212.

Moss v. Sanger, 12 S. W. Rep. 616 (Texas).

Jones on Chattel Mortgages, Secs. 54, 55 and 56.

Cobbey on Chattel Mortgages, Vol. 1, Secs. 182 and 183.

Herman on Chattel Mortgages, Secs. 33 and 42.

Fowler v. Hunt, 48 Wis. 345.

Price v. McComas, 21 Neb. 195.

Newell v. Warner, 44 Barb. 263. (N. Y).

Bullock v. Williams, 16 Pick. 33. (Mass.)

Stonebroker v. Ford, 81 Mo. 532.

Parker v. Chase, 62 Vt. 206.

Sowder v. Vorhees, 36 Kas. 138.

Clark v. Vorhees, 36 Kas. 144.

Richardson v. Alpina Lumber Co., 40 Mich. 203.

Barrett v. Fisch, 76 Ia. 552.

Croswell v. Allis, 25 Conn. 301.

Tindall v. Wasson, 74 Ind. 499 and 500.

Gregory v. N. P. L. Co., 15 Ore. 447.

Taber v. Sampson, 7 Colo. 427.

Byrd v. Forbes, 13 Pac. Rep. 715 (Washington Territory).

Machine Co. v. Min., etc., Co. 61 N. W. Rep. 378 (Minn.)

Krone v. Phelps, 43 Ark. 350.

Suggs v. Tillman, 3 Swan. 208. (Tenn.)

Blakey v. Patrick, 67 N. C. 40.

Stewart v. Jaques, 77 Ga. 365.

Kelly v. Reid, 57 Miss. 89.

Jackson v. Christenson, 55 Pac. Rep. 562 (Utah).

ARGUMENT.

The inconsistent and unreasonable results reached by the judgment in this case shows the unsoundness of the opinion of the Supreme Court of Texas. That court decides: (1) That the defendants in error CAN select from the herd of similar cattle and recover the value of 50 cows, BE-

CAUSE NO PARTICULAR ANIMALS CAN BE IDENTIFIED.

(2) That defendants in error CANNOT select from the herd of similar cattle and recover the value of 50 calves, BECAUSE NO PARTICULAR ANIMALS CAN BE IDENTIFIED.

(3) That defendants in error CAN select from the herd of similar horses 3 colts, BECAUSE NO PARTICULAR ANIMALS CAN BE IDENTIFIED.

We know of no process of reasoning or principle of law by which these results can be reconciled. We submit that the only correct result should be this: That the defendants in error CANNOT recover against plaintiffs in error in this case AT ALL, BECAUSE NO PARTICULAR ANIMALS CAN BE IDENTIFIED. This result is supported by every text writer and every reported case on the subject as shown by the following quotations:

In Northwestern National Bank v. Freeman, supra, Justice McKenna says: "The rule is laid down that as to third persons who have acquired interests a description in a mortgage of a given number of articles out of a larger number is not sufficient."

In Avery v. Popper, supra, on the former appeal in the case at bar in 1894, the court says: "Under the evidence it appears that there were many more animals of the same description all mingled together and there had been no separation at the time they were taken in execution. This rendered the description wholly insufficient." This case has been cited and approved in Jackson v. Christenson, supra, and in Am. & Eng. Enc. Law (2nd Ed.). Vol. 5, p. 962.

Jones on Chattel Mortgages states the law thus, in sections 54, 55 and 56: Sec. 54: "A de-

scription may be sufficient between the immediate parties to the mortgage which would not be sufficient as against creditors of the mortgagor, or purchasers from him." Sec. 55: "A description which is sufficient between the parties may be insufficient as against third parties. In treating of the sufficiency of descriptions contained in mortgages, their sufficiency as against third parties is referred to unless their sufficiency as between the parties is expressly designated." Sec. 56: "A mortgage of a specified number of articles out of a larger number is void for uncertainty when the particular articles intended to be conveyed are not separated or designated in any way so that they can be separated from others of the same kind."

The above statement of the law is supported by sound reason and by every reported decision on the subject, including all those above cited.

The opinion in the case at bar fails to observe the above distinction, and holds that because this mortgage may be valid between the parties, it is therefore valid against levying creditors, purchasers and all third persons. As shown by the above cases, there are many good reasons why this distinction should be observed, and such mortgages be held invalid against creditors and purchasers. "To hide away his entire crops from his creditors, a party need only to give a chattel mortgage on a few bushels of the whole product, describing it so imperfectly that neither creditor nor officer could distinguish the mortgaged from the reserved." Clark v. Vorhees, 36 Kas. 144.

"The debtor may pass his claim from one part of the bulk to another under this undefined right until all is consumed." Sugg v. Tillman, 2 Swan. 208 (Tenn.)

"To sustain such mortgages would, I think, enable parties to commit gross fraud." Richardson v. Alpina Lumber Co., 40 Mich. 203.

"It has frequently been held by this Court that the record of a mortgage containing a description similar to that in question was not constructive notice to creditors, or subsequent purchaser of the rights of the mortgagee." Barrett v. Fisch, 76 Ia. 552.

"But if such property requires to be measured, weighed, counted off or otherwise separated from other and larger parcels or quantities, these are not to be considered as dispensed with by registration." Bullock v. Williams, 16 Pick. 33.

"The bank is found to be an innocent purchaser for value. By this is meant that it had no actual notice of the prior mortgages. Did the law impute notice to it? Certainly not by the record of the mortgage to appellee." Northwestern Nat. Bank v. Freeman, supra.

This opinion in the case at bar also ignores the distinction between this right of selection as between the mortgagor and mortgagee and such right after the interest of levying creditors or purchasers have attached, On the contrary it holds that the mortgagee has an unlimited right of selection, and after the property has been levied on and sold he can select the very articles sold and sue the officer or purchaser for them or their value. This is opposed to all the authorities and to sound reason. In Parker v. Chase, 62 Vt. 206, the court says: "It is suggested that such a mortgage is notice that a given number are incumbered and that the party may be called upon to complete the designation. A mortgage which leaves the designation of the specific property resting exclusvely

in the minds of the parties fails to meet the fundamental purposes and requirements of the law."

Fowler v. Hunt, 48 Wis. 345, holds: "The mortgage leaves a right of future selection of any of the property to the mortgagor to the value of $200.00, the residue of which can be ascertained only by such selection, and in either view such uncertainty of description renders the mortgage void."

Sowder v. Vorhees, 36 Kas. 138 holds: "How then was the corn to be designated? What portion of the tract was the mortgaged corn to be taken from? What quality was conveyed, the good, the inferior, or the very inferior? By whom was the selection or designation to be made? Counsel for plaintiff have not satisfactorily answered these questions."

In Richardson v. Alpina Lumber Co., 40 Mich. 207, the court says: "It will thus be seen that the question as to whether these mortgages are void for uncertainty or not does not arise between the mortgagor and the mortgagees. It is not the intention therefore to intimate what the rule would be in such cases. It is evident that after third parties have acquired rights in such a case very serious questions might arise in carrying out such a mortgage. If the mortgagee should attempt to take possession of the quantity described, would he have a right to assort and take such logs as he thought proper, or would the mortgagor be the person to make the selection, or both together? If the mortgagee was the proper person, would he not be most likely to pick out and take the most valuable? And if the mortgagor was the proper party to make the selection, he might take the other extreme, and point out those of least value. While, if both should act in concert and disputes arise

between them, which would have the right to control? Or if they did agree, might they not make a selection entirely different from the one contemplated at the time the mortgage was given, for the purpose of injuriously affecting the rights and interest which third parties had in the mean time acquired in the property? It is clear that if the parties interested are to make the selection, then the persons who have intermediate the date of the mortgage and the time of selection acquired interests, should be consulted and take part, and if a number of persons have thus acquired distinct and separate interests all would have to be called in and would have a right to participate in the selection etc. * * It seems to me that serious difficulties must inevitably arise in any aspect of the case in attempting to carry out such an agreement."

Under the doctrine of the case at bar, it would be impossible for a United States marshal to make a levy without subjecting him or the creditor in the execution to an action for damages. In Cornelius v. Burford, 28 Tex. 203, it is held that: "There is no doubt that an officer is liable in damages for making an excessive levy." Suppose that A. owns 1000 head of cattle, worth $10.00 per head, and that B. who lives in New York or London, holds a note on A. for $1,000.00 secured by a chattel mortgage decribing the security simply as 100 head out of this herd. Suppose that an execution against A. for $1,000.00 is placed in the hands of the marshal, what can he do? If he levies on the whole 1000 head he will be liable to the mortgagor for an excessive levy,as 100 head would be sufficient. If he seizes 100 head he will have no lien on the balance, and the mortgagor could sell

the balance. After a sale of the 100 head by the marshal, the morgagee could select these identical cattle and sue the marshal or the purchaser for them, or their value, under the doctrine of this case. If the marshal could levy on the whole herd the expense of holding the cattle and searching over America and England for the mortgagee would certainly hinder and delay, if not entirely defeat, the collection of the debt. The same thing would apply to a purchaser of any of the cattle. The mortgagor could dispose of the balance and the mortgagee could then select and sue for the ones sold. "If a mortgage with a description like this, that gives no clue by which parties may know what part is mortgaged and what reserved is to be upheld, then gross fraud can be easily committed" Clark v. Vorhees, 36 Kas. 144. "To sustain such mortgages would, I think, enable parties to commit gross frauds and would also tend to prevent the parties from afterwards purchasing or acquiring interest in the property, a part of which had been thus mortgaged, and thus tend to discourage trade." Richardson v. Alpina Lumber Co., 40 Mich. 203.

PROPOSITION UNDER THIRD ASSIGNMENT OF ERROR.

The judgment in the case at bar is clearly wrong to the extent of $200.00, the value of the mare, horse and mule colt.

STATEMENT.

The trial court rendered judgment against plaintiffs in error for $850.00 (Record p. 13). The Supreme Court states in its opinion that this was: "the value of fifty cows, one bay mare colt, one bay horse colt and one black mare colt" (Record p. 63).

The Supreme Court then finds the value of the fifty cows to be $13.00 per head, making $650.00 (Record p. 64). It then holds that defendants in error cannot recover the value of the calves, and then renders the same judgment as the trial court, for $850.00, against the plaintiffs in error. The difference of $200.00 is the value of the three colts (Record p. 67). If defendants in error were not entitled to recover the value of the three colts the judgment is clearly wrong to the extent of $200.00 at least.

The mortgage attempts to cover fifty cows, branded Cook OK, with spring calves following the cows, and five mares branded J6, with spring colts following the mares, all in a pasture, etc. (Record pp. 25 and 26). J. H. Cooke testified that at the time this attempted mortgage was given there were "in the pasture about 100 head of cows, with calves following them, marked and branded the same as those in the chattel mortgage, and had there some ten or twelve mares, branded J6, with colts following them, in that pasture" (Record p. 25). He testified to the same thing on pages 36, 40 and 43 of the Record, and this evidence is undisputed. The Supreme Court finds as a fact that "At the time the mortgage was executed to secure the note there were many more animals of the same description mingled with those upon which the mortgage was given * * *, but the animals covered by the mortgage were not separated from the others of the same description with which they were mingled, nor was there such separation when the execution in favor of Avery was levied upon the property in controversy" (Record p. 64).

ARGUMENT.

From the foregoing statement it appears that the facts in regard to these colts are identically the same as those with reference to the calves. It would seem, therefore, that the same conclusion should be reached as to both. In its opinion the Supreme Court uses this language: "As we have seen, no right attached under the mortgage to specific animals, nor did it give a lien upon an undivided interest in the herd. * * * If the right (of selection) had been exercised while the calves of the spring of 1891 were following their mothers, the selection of the cow would have identified the calf. But having failed to exercise the right until in the course of nature the dam and the young would separate, it has become impossible to identify the calves, and all claim upon them has failed, before Avery converted the stock" (Record p. 66). The court therefore denied a recovery for the calves. By substituting the words "colts" for "calves" the above reasoning would apply exactly to the colts, for which recovery was allowed. The Supreme Court gives no reason for this distinction, and we cannot imagine any.

We also submit that this reasoning would equally apply to the cows. If, as held by the court, "no right attached under the mortgage to specific animals, nor did it give a lien upon an undivided interest in the herd," it would seem to clearly follow that "it has become impossible to identify the 'cows', and all claim upon them failed before Avery converted the stock."

It may be that allowing a recovery for the value of these colts was an oversight by the Supreme Court of Texas. But plaintiffs in error distinctly called this matter to the court's attention

both in their assignments of error (Record p. 48) and in their motion for rehearing before that court (Record p. 80).

PROPOSITION UNDER FOURTH ASSIGNMENT OF ERROR.

The undisputed evidence and the facts showed, as a matter of law, that the mortgage sued on in connection with the acts of the mortgagor and mortgagee, was fraudulent and void in law as against the creditors of the mortgagor and those claiming under such creditors.

STATEMENT.

The mortgage sued on was given May, 1891, to secure a note of even date in favor of T. H. King. After its maturity it was assigned by him to defendants in error (Record p. 2). W. W. Avery, under whom plaintiffs in error claimed, recovered his judgment against J. H. Cooke June 10, 1889, and an execution on this judgment was levied on this property in June, 1893 (Record pp. 33 and 34). In November, 1889, the mortgagor, J. H. Cooke, failed and made a deed of trust, covering all his property, to C. J. Steger (Record p. 28). R. R. Neyland, one of the defendants in error, obtained the mortgage sued on, and he testified as follows: "I think that since that Steger deed of trust in November, 1889, Mr. Cooke has been insolvent" (Record p. 31). J. H. Cooke, the mortgagor, testified as follows: "In 1892 I sold eight or ten head of horses and mules included in this chattel mortgage sued on and received about $800.00 for them. At that time T. H. King held the note sued on, and this sale was made with his consent. I paid him over about $600.00 of the money, telling him that it was part of the proceeds of the sale of

this stock, and with his consent I kept $200.00 of the money and used it in my business" (Record p. 21). All the foregoing facts are undisputed, and they were pleaded and insisted upon in the courts below (Record pp. 9, 50 and 80).

AUTHORITIES.

Freeman on Executions (2d ed.), sec. 145.
Andrews v. Dunn, 39 S. W. Rep. 209 (Texas).
Brown v. Barber, 47 Kan. 527.
Hangen v. Hochmeister, 114 N. Y. 566.
Goddard v. Jones, 78 Mo. 518.
News v. Sailors, 114 Ind. 407.
Fisk v. Harshaw, 45 Wis. 668.

ARGUMENT.

Freeman on Executions, supra, says: "If the mortgagor is, by agreement of the parties, permitted to retain any portion of the proceeds of sale made by him, either for his own use or for the support of himself or family or any member thereof, the mortgage is doubtless fraudulent, and void AS A MATTER OF LAW."

In Andrews v. Dunn, supra, the court holds: "He (the mortgagee) cannot manage his mortgage lien so as to enable the debtor to appropriate the property or a portion of it, while he holds off other creditors by the assertion of his mortgage lien against them." The other cases cited above are to the some effect and fully sustain the above proposition. We therefore submit that the mortgage sued on is fraudulent and void as against plaintiffs in error.

PROPOSITION UNDER FIFTH ASSIGNMENT OF ERROR.

Where the State court applies a measure of damages, for acts of a United States marshal act-

ing under an execution from the Federal court, different from the measure applied for similar acts of a State sheriff acting under an execution from the State court, the judgment of the State court must be reversed.

STATEMENT.

The plaintiffs in error were not parties to or liable on the note and mortgage sued on. Their liability is claimed on the ground that the property was levied upon and sold by the United States marshal and converted. This levy, sale and conversion, if any, took place in June, 1893 (Record p. 34). The trial of this case in the trial court occurred in November, 1897, more than four years thereafter (Record p. 13). The Court of Civil Appeals made the following findings of facts, viz.: "The finding of the trial court, which is sustained by the evidence, as to the value of the property in controversy, is as follows: Cows $13.00 per head," &c. (Record p. 57). "The evidence is sufficient to show the value of the property at the time of the trial, was as found by the trial court, and the value so found relates to that time and not to the time the property was levied upon by the United States marshal, or when the writs of sequestration were issued" (Record p. 59). Under the laws of Texas these findings of fact are binding on the Supreme Court of Texas, and that court adopted the value as found by the trial court and Court of Civil Appeals and rendered judgment for the value of the animals at the time of the trial in November, 1897. (Record pp. 64, 67 and 77).

AUTHORITIES.

Revised Statutes of the United States, Secs. 788 and 916.

Jones on Chattel Mortgages, Sec. 448.

Tucker v. Hamlin, 60 Tex. 174.

Block v. Sweeny, 63 Tex. 426.

Gilmore v. Heintz, 85 Tex. 79.

McLeod, &c., v. Craig, 43 Southwestern Reporter, 934 (Texas).

ARGUMENT.

Under the above sections of the Revised Statutes of the United States it seems clear that the same measure or rule of damages must be applied for a levy, sale and conversion growing out of the acts of a United States marshal acting under Federal process as would be applied under similar circumstances to similar acts of a State sheriff under State process. It is also evident that the judgment against plaintiffs in error is based on a conversion growing out of such levy and sale by a United States marshal. In its opinion the Supreme Court of Texas says: "All of said property was, on June 28, 1893, by virtue of said execution, sold by the United States marshal in Hunt county, Texas, at public outcry and was bid in by J. M. Avery in the name of W. W. Avery, and all the property was delivered by the marshal to J. M. Avery, the attorney for W. W. Avery" (Record p. 63). "After J. M. Avery replevied the property he drove it out of Hunt county, Texas, and within a short time thereafter sold and disposed of all of it. He had none of said property on hand when this suit was tried in the court below" (Record p. 64). "Avery got possession of the property and converted it to his own use. He was liable for its value" (Record

p. 67). From the above statement it is also clear that the judgment is for the value of the animals at the time of the trial in November, 1897, and not their value at the time of the alleged levy, sale and conversion in June, 1893. The only question therefore is: Did the State court assess their value at a different date and apply a different measure of damages from that applicable to other similar cases under State process?

The usual rule applicable to such cases is thus stated by Jones on Chattel Mortgages, Sec. 448: "The damages which a mortgagee is entitled to recover is the value of the property AT THE TIME OF THE CONVERSION." We submit that the only reasonable and sensible rule in such cases is the value of the animals at the time of the conversion, and legal interest thereon since that date. This fully compensates plaintiff. for his damages and any other measure is mere guesswork. A witness familiar with such matters can reasonably and properly swear to the value of animals when he last saw them and while they are alive, but he can only guess at what they would be worth five years after they have died.

This is illustrated by the testimony admitted in this case. The witness, Teague, testified that at the time of the levy and conversion in June, 1893, these cows were worth $10.00 per head, and as to their value on the day of the trial, in November, 1897, he testified: "Those cattle to-day MIGHT be worth 25 per cent more than they were at that time" (Record p. 42). The witness, Humphreys, testified to the same value in 1893, and then said: "I EXPECT that those cattle to-day would be worth 25 per cent more than they were in June, 1893" (Record p. 44). The witness, McUlmurray, testi-

fied in the same uncertain way as to the increase in value of the horses and mule (Record p. 45). The plaintiffs in error objected to all testimony as to their value at the time of the trial in 1897, but their objections were overruled, and they excepted. (Record pp. 42, 44 and 45). The trial court and appellate courts based their findings on this guesswork and found the value to be $13.00 per head, about 25 per cent more than they were worth in 1893.

It is well known that cattle and horses, like other personal property, fluctuate in value. Cattle are now worth about twice as much as in 1893.

If the case was tried now, under the rule in this case, the witnesses would guess that the cattle, though dead, were worth twice as much as in 1893, and the judge would guess that the plaintiffs in error were liable for $1700 instead of $850, as in 1897. Under this rule the rights of parties are not certain, but depend on what day the case happens to be tried.

We also submit that in similar actions growing out of the acts of State officers, the rule is well settled in Texas that the measure of damages is the value of the property at the time and place of seizure and conversion and interest thereon. Tucker v. Hamlin, 60 Tex. 174, was an action against the sheriff and attaching creditors for unlawful seizure and sale of certain articles under a writ of attachment, and the court says: "The measure of such damages has been well settled by the decisions of this court to be the value of the goods seized at the place of the seizure ON THE DAY of conversion and interest on that value."

Block v. Sweeney, 63 Tex. 426, was a similar

action, and the court says: "Interest, in addition to the market value at the TIME and place of seizure, is the compensation to which a person in an action of this kind is entitled. If, between the time of seizure and sale the property depreciates in value, that cannot affect the right of the person whose property has been illegally converted; if it increased in value that fact cannot affect the amount of the recovery."

In McLeod, &c., Co. v. Craig, supra, the Court of Civil Appeals of Texas, as correctly shown by the head notes, held as follows: "Where, in a suit for the enforcement of a mortgage, the property is sequestered and defendant replevies it, the measure of liability on the bond is the value of the property at the date of the approval of the bond, with legal interest." The Supreme Court of Texas refused a writ of error in that case and approved this holding.

We therefore submit that in the case at bar the courts below applied a different rule of damages to the acts of the United States marshal from the well settled rule applied to similar acts of a State officer under similar circumstances; which was contrary to the laws of the United States.

CROSS ASSIGNMENTS OF ERROR BY APPELLEES.

We notice that there is included in the printed record a paper called "cross assignments of error by appellees" (Record p. 92). This is not found in the written record sent up by the clerk of the Supreme Court of Texas and certified by him to contain all the record and proceedings in the State Supreme Court (Record p. 90) It is headed "In the Court of Civil Appeals, Fifth Supreme Judicial District of Texas" (Record p. 92). In

pursuance of rule 10, section 9, of this court by stipulation of the parties, only certain parts of the written record necessary for the decision in this court were to be printed, and it was agreed that this paper might be printed for what it was worth (Record pp. 91–92). The written record was filed in this Court May 24, 1899, and this stipulation containing this paper was filed Aug. 24, 1899 (Record p. 96). The defendants in error never sued out any writ of error from this Court and have never filed in this Court any assignment of error complaining of the action of the Supreme Court of Texas. This paper complains of certain errors alleged to have been committed by the trial court.

We do not know whether the defendants in error will attempt to urge this matter or not. But in regard to this paper and this matter we submit the following:

FIRST.

This paper cannot be considered a part of the record in this Court, and even if it could be thus considered, it cannot take the place of the assignment of error required to be filed by Section 997 of the United States Revised Statutes.

AUTHORITIES.

Benites v. Hampton, 123 U. S. 519.

In above case the Court says: "The assignment of errors on the appeal from the District Court to the Supreme Court of the Territory can not be accepted in this Court as the equivalent of the assignment required by the Statute."

SECOND.

The defendants in error have not taken out a writ of error in this case and cannot assign errors or complain of any ruling or judgment adverse to them in the courts below.

AUTHORITIES.

Bolles v. Outing Co., decided by U. S. Supreme Court December 4, 1899, and cases therein cited.

In disposing of similar matters in the above case, Mr. Justice Brown, for this Court, says: "It is sufficient to say of these that defendant did not take out a writ of error and cannot now be heard to complain of any adverse rulings in the court below."

We therefore submit that this paper and the questions attempted to be raised in it cannot be considered by this Court. But if they are considered, the questions presented are fully met and discussed in our presentation of our first and second assignments of error in this brief, and need not be again repeated.

CONCLUSION.

We respectfully submit: (1), that the mortgage sued on was invalid as against the judgment and execution from the United States Circuit Court, and the levy and sale by the United States marshal, and the title of plaintiffs in error acquired thereby was superior to the rights of defendants in error; (2), that the judgment below was erroneous at least to the extent of $200.00, the value of the three colts; (3), that the mortgage

sued on, in connection with the acts of the mortgagor and morgagee, is fraudulent and void as against the title of plaintiffs in error acquired through the above judgment and execution from the United States Circuit Court and the levy and sale by the United States marshal; and (4), that by the judgment below a different and greater measure of damages is applied to a sale by a United States marshal from that applied to similar acts by State officers, contrary to the laws of the United States.

All of the matters presented in this brief have been specially set up and insisted upon throughout this litigation by plaintiffs in error and the decision and judgment below is against their title and claims under the laws and authority of the United States and its courts and officers. We therefore pray that the judgment below be reversed and the cause remanded.

JOHN M. AVERY,

Attorney for Plaintiffs in Error, J. M. Avery, C. C. Cobb and H. I. Phillips.